

1889

The Duty of the Common Carrier to Gratuitous Passengers

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T h e s i s

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The Duty of the Common Carrier
to

Gratuitous Passengers.

--by--

Owen L. Potter.

C o r n e l l U n i v e r s i t y ,

S c h o o l o f L a w .

1889.

The different rules of care that a carrier of passengers owes to those passengers whom it carries gratuitously, and its right to limit that care by an express contract with the passenger is of comparatively recent origin and development.

The attention of the courts was first called ~~on~~ to ~~decide~~ this question less than half a century ago. During the interval that has since elapsed the question has been litigated in all its different phases, and numerous contradictory decisions rendered.

It would be useless to try to reconcile these decisions, as they are in many cases arbitrary, and ignore prior decisions that have been made in the

same jurisdiction.

In some states it has been held that a carrier of passengers owes the same degree of care to free passengers as he does to those that pay fare.

While in other states a different rule has been followed, namely, that a carrier of gratuitous passengers is only bound to use slight care. And again there is a dispute as to what extent a carrier can limit his liability by express contract.

The leading case in this Country on the subject, and in the absence of contract exempting the carrier from liability, is the case of Philadelphia Reading Railway Company vs. Derby, 14 Howard, 408. In this case Derby, the plaintiff, was a stockholder in the

defendant company, and on the invitation of its president was riding in a special car provided by the company, a collision took place by the negligence of the agents of the company in allowing a freight train to stand on the track when they had orders to keep the track clear, and in which the plaintiff was injured, and he brought action for damages.

The company sought to defend the suit on the ground that the plaintiff was a gratuitous passenger. The court held, that it was the duty of the carrier to transport the passenger safely, and that this duty did not arise from the compensation paid for the service; that this duty is imposed by law even when the service is gratuitous, and that as

the plaintiff was lawfully on defendant's car at the time of the injury, the fact that he had paid no fare did not affect his right to recover for the injury. The court also said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or negligence of careless agents, any negligence in such cases may well deserve the epithet Gross!"

The doctrine laid down in the Derby case was

reaffirmed in the case of Steamboat New World vs.

King, 16 Howard 260. King was a passenger on

board a steamer on a voyage from Sacramento to San Fran-

cisco, and was injured by the exploding of a boiler

flue caused by the negligence of the agents of the

company. It seems that King had formerly been em-

ployed as a waiter on board this boat, and just be-

fore she sailed from Sacramento, he applied to the

master for a free passage to San Francisco which was

granted him and he came on board.

The company was held liable for the injury,

and the court said: "We desire to be understood to

reaffirm the doctrine of the Derby case, as rest-

ing not only on public policy, but on sound princi-

ples of law." Thus we see that in the absence of contract exempting the carrier from liability for injuries to a gratuitous passenger that he is still liable the same as though fare had been paid.

This is well settled both in England and in this Country, although there are some contrary decisions.

Railroad companies are incorporated, in part at least, from considerations of public policy and for public good, and as carriers of persons they may be considered as acting in a public capacity, and being creatures of the law they are held to a strict degree of care for the safety of the lives and limbs of those whom they carry. The liability

of a carrier of passengers is imposed by law, and requires him to use the utmost care and foresight for the safety of his passengers, and holds him liable for the slightest neglect, and for like reasons the same extreme care is required though the passenger be carried gratuitously; having undertaken to carry a person, the obligation arises to carry safely and properly, even in the case of gratuitous passengers.

The case of Gillenwater vs. M & I. Ry. Co., 5 Ind., 339, where Gillenwater was injured, while riding on the cars of the defendant, through the negligence of its agents. The company was held liable notwithstanding the fact that he paid no

fare. It seems that he was employed by the railroad company to frame and build a bridge on their road across a creek, and while so employed the company directed him to proceed on their cars to Greenwood, and assist in loading timbers for the bridge; that while thus on their cars as directed the defendants so carelessly managed the same that they were thrown off the track down a bank, by means of which his right hand was so badly injured as to disable him from pursuing his business. It was held that it made no difference that Gillenwater was traveling on the road, at the time paying no fare, and that the company was liable to him as a passenger and stranger. Applying the rule that

railroad carriers are responsible to passengers to the utmost care of very cautious persons, it follows that they are liable in every case of injury to a passenger, if he is lawfully on their cars, whether he has paid fare or not. If a person is a trespasser on the cars and is injured the carrier is not liable to him, as there is no undertaking on the part of the carrier towards such a person, and he could not, on any grounds, hold the carrier. There is a duty that the carrier owes the passenger on his own account, and also on the account of his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which a state or gov-

ernment has in protecting the lives and limbs of its subjects. And so far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is above all other considerations from its nature; and no stipulation of the parties should be allowed to modify or vary it, whether the case is one of passenger for hire or merely a gratuitous passenger, the interest of the state is the same in both.

The more rigid the rule as to the duty and liability of the carrier, and the more strictly enforced, the greater will be the care exercised by the carrier towards his passengers. It is true

that common carriers of passengers are not insurers of the safety of passengers, as they are in the case of goods which they carry; but principles of law which forbid their being allowed to exempt themselves from the consequence of their negligence in respect to goods applies with still greater force in the case of passengers. The Common law had a great regard for human life, and for this reason it exacted a greater degree of care in respect to it than in mere relation to any other matter of property. (Shearman and Redfield on Negligence).

In New York it has been held, by the Court of Appeals, three judges dissenting, that a common

carrier can, in consideration of an abatement in whole or in part of his legal fare, lawfully contract with a passenger that the latter will take upon himself the risk of damage from negligence of agents and servants, for which the carrier would otherwise be liable. In this case Bissell was a drover and made a contract with the defendants which recited that, in consideration that defendants would convey the stock at what was termed reduced rates, the plaintiff to assume the risks of the journey, and all risks of injury to the stock. The ticket also contained a notice that the owner of stock receiving this ticket assumes all risks for injuries, whether from negligence of defendants' servants or otherwise. (25 N. Y., 442).

It is well settled that a carrier ^amy in this state, by special contract, exempt himself from all liability, but that of the directors or managers themselves, and it will be sustained by the courts.

The weight of authority in this country is against such contracts. The courts of this state for a long time resisted the attempts of common carriers to limit their common law liability and, at first, only allowed them to do so for the purpose of obtaining a disclosure in the case of goods that were subject to extra hazard and risk. But now this is changed, and the carrier can limit his liability as imposed by law to almost any extent that can be conceived.

Whether it was wise on the part of the courts
to ~~in~~ upholding such contracts is a matter of dispute.

It can be said that a person who enters into such
a contract should be bound by the terms it imposes,
and should not, in case a loss occurs to him, or if
he is injured, bring action to recover what he has
expressly contracted away, but in all cases where a
contract is made between a drover and a carrier
they do not stand on equal footing and it may be
presumed that the carrier has made the contract all
in his favor, and for that reason it would seem but
just that he should still be liable for certain
acts and not be allowed under any circumstances to
escape them.

There has been an attempt to hold a carrier

of passengers liable for injuries to a free passenger, only when such injuries arise from gross negligence, but it is now pretty well settled that it makes no difference whether the injury be caused by slight or gross negligence that the carrier is liable for both, and the only exception is whether the person injured was lawfully on the cars at the time the injury occurred, and if the person injured was a trespasser the carrier is not liable.

3 Mont, 90, holds that a carrier of passengers is bound to exercise only ordinary care toward trespassers.

The effect of a contract whereby a carrier of passengers attempts to avoid his liability for

negligence, and this most frequently arises in cases where persons are traveling on free passes, and on which are printed conditions that the person using the pass assumes all risk, and that the carrier be released from all negligence. In the case of Wells vs. N. Y. C. Ry. Co., 24 N. Y., it was held that a person accepting a free ticket was bound by its terms and that such a contract is valid. This was decided by a divided court and this case has been widely commented on and criticized and it is thought by many courts and writers on this subject that the dissenting opinion by Sutherland, J. is founded on the better reasoning. It is certainly in harmony with the weight of au-

thority and also consistent with public policy.

Sutherland, J., who dissented holds a contract exempting a carrier from all liability to be against public policy, and therefore void. He enquires:

"And is it not plain that any contract which may induce or lead, or tend to induce or lead to a relaxation, of the care and attention required by law as a social duty for the preservation of human life interferes with this public policy, and should be held void as against the laws declaring it." And his views are based on the ground that railroad companies are, in a certain sense, public officials, and the rule binding them to great care was not established only for the benefit of the party

injured, but also for the benefit of the entire public, "and that a passenger cannot, by any contract in advance of the injury, lay aside his individual benefit from the law or rule of liability." And this was followed in Perkins vs. the same company, and the further principle that the negligence from which the carrier could exempt itself was that of its agents or employees, but it could not exempt itself from the negligence of its directors or managers, as they may be considered the corporation itself, and negligence on their part would be a breach of duty which the company owes to the public. And Smith, J., said: "Servants or agents mean conductors, engineers, brake-

men, baggagemen, switch tenders and so on."

Thus as far as the law is concerned in this state it is well settled; and a carrier can exempt itself from all liability, except that arising from the culpable negligence of its directors or managers. And, notwithstanding that the United States Supreme Court has established and firmly maintains a different rule, the courts in this state stand firmly by their former decisions, and in 71 N. Y., 180, Maynard vs. Syracuse Railroad Company, it was held that the rule laid down by the United States Supreme Court to the contrary did not modify or relax the rule in this state, and that the common carrier may make special contracts to the extent

of enabling it to exonerate itself from the effects of even gross negligence.

We will now consider the rule as applied in some other states as affecting a carrier's right to limit his liability. In Penn. Ry. Co. vs. Henderson, 51 Pa. St., 315, it was held by the Supreme court that a contract for exemption from all liability for negligence was void, as being against the policy of the law.

It appeared in this case that Henderson, on the trip on which he was killed, shipped some livestock to Philadelphia and received a drover's pass, being a ticket given to the person in charge of the stock, there being no charge for the ticket, and

the freight being the same whether any person went with the stock or not. On this ticket was the following endorsement: "The person accepting this free ticket assumes all risk of accidents and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by its agents or otherwise for any injury to the person or for the property of the party using this ticket." But, notwithstanding this contract, the company was held liable.

The courts of Pennsylvania have never been led away from the Common law liability of the carrier, and while they criticize the rule laid down and followed in this state, they still maintain and

hold that all contracts that release the carrier from all liability are void. Carriers in that state are held to a strict account for the safety of the lives of their passengers, and the rule is rigidly enforced without any relaxation even in the case of contract allowing them to throw off their liability. And even supposing that a carrier can, by special contract, exempt itself from other exemptions than those allowed by law, still such contracts ought not to be allowed to release them from the consequences of gross negligence, as gross negligence on the part of a carrier of passengers should be looked upon as a crime, at least he is bound in employing agents to select only careful

and skillful men; and in view of the many accidents that happen in these days of railroad travel, instead of relaxing the rules of law relating to the common carrier of passengers, they should be drawn around them with a still stronger hand than they have been in times past. As said by Davis, J., in the case of *Stinson vs. New York Central Railroad Company*, 32 N. Y., 335, "The fruits of the rule allowing carriers to release themselves from liability are already being gathered in increasing accidents through decreasing care and vigilance on the part of the corporations, and they will be continued to be reaped until a just sense of public policy shall lead to legislative restriction upon power

to make this kind of contracts."

Now take the case of contracts between a drover and a carrier where the carrier states that in consideration of carrying the cattle at reduced rates, and giving the drover a free ticket, that he thereby assumes all risks from whatever cause arising. The statements usually made by a carrier in such cases are purely fictitious and he does not really carry at reduced rates, he only takes this way of evading his liability.

It is absolutely necessary in carrying stock that the person who has charge of them should be carried by the company so he can take care of the stock, and the price paid for the stock, or

freight on the stock, includes the cost of transporting the drover, or the person accompanying the stock, who is not, therefore, a gratuitous passenger, but a paying one, and the word free is, therefore, only true so far as that the conductor of the particular train on which he travels is not entitled to charge him separately for his passage.

This is the rule followed in the United States

Supreme Court, in the case of Railroad Company vs.

Lockwood, 17 Wallace, 357. Lockwood, a drover,

was injured while traveling on a stock train from

Buffalo to Albany, and brought action to recover

damages for the injury. He had cattle on the

train, and had been required, at Buffalo, to sign

an agreement to attend to the loading, transporting and unloading of them, and to take all risk of injury to them, and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass, that is, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the journey. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than regular rates charged, but it was shown that these rates were about three times the ordinary rates charged, and that no drover had

cattle carried on those terms but that signed similar agreements to that signed by Lockwood, and received similar passes.

It was held by the court that Lockwood was a passenger for hire, and that the company could not exempt itself from its liability. The result might have been different had the court found that Lockwood was a free passenger, but as to this it was not even hinted how they would have decided had this been the case. But it was said that it was against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence that is imposed upon them for the performance of their duty. We have al-

ready seen that this is contrary to the rule in this state, as here a drover is held to be a free passenger, and that a carrier can release himself from all liability to such drover. While the courts of this state are not bound to follow the decisions of the Federal Court, it would perhaps be better if they would do so, and it seems that they could consistently, with reasons of principle and policy, do so.

In England it is now settled that a common carrier may, by special contract, exempt itself from all liability, whether arising from slight, ordinary, or gross negligence. The case of *McCawley vs. Furners Ry. Co.*, 8 Queen's Bench, 57, where a

drover was carried under a pass, one of the conditions of which was, that McCawley was to travel at his own risk. And it was held that this exempted the company from all liability for injuries to him, whether caused by slight or gross negligence, and also where a person takes his own risk, it makes no difference as to the degree of negligence whereby he was injured. The English cases are decided on the ground that a drover is a free passenger, and that the carrier can, in consideration of free transportation, limit his liability for injuries to such passenger. This is, however, contrary to the earlier decisions, and it was formerly held that a condition that the owner should undertake all risk of conveyance was unreasonable, be-

cause it protected the company from the consequences of injury, though caused by their own misconduct.

So we see that in England the law has gradually changed till it has now reached the same result that has been given such contracts in this state, with the exception of gross negligence, and it is doubtful if our courts will ever allow the rule to be thus applied.

As a check on carriers limiting their liability, Parliament, in 1854, passed an act called the Railway and Canal Traffic Act, declaring that railway and canal companies should be liable for the negligence of themselves or their servants, not-

withstanding any notice or conditions, unless the court or judge trying the cause should adjudge the conditions just and reasonable.

This statute practically brought the law back to its original standing, and thus the law stands at the present time in regard to contracts between carrier and passenger, and the only limitation is that the court shall, in all cases of contract where the carrier seeks to avoid his liability for injuries, say whether the contract is just and reasonable.

We have in this country three different doctrines in regard to degree of care required to be exercised by the carrier towards gratuitous pas-

sengers. That of the United States Supreme Court, holding all contracts that exempt the carrier from all liability void. The rule followed in Pennsylvania, allowing the carrier to limit his liability to some extent but not for gross negligence. And the radical rule laid down and pushed along in this state by the aid of the courts. For New York certainly stands alone and has the honor, (if such it may be called) of allowing greater latitude to contracts exempting the carrier from all liability for negligence than any other state.

The law can only be brought back to its original standing by legislative enactment; and we hope to see the duty of common carriers of passen-

gers, whether they be gratuitous or paying passengers, rigidly enforced, and such laws enacted as will tend to lessen the number of accidents that are caused by negligence and indifference on the part of railroad companies.

It is difficult to perceive , however, why some courts hold that a free passenger may contract that he shall make no claim for damages incurred by the negligence of the servants of the carrier. Public policy forbids such contracts, and it should not be considered whether the service is gratuitous or not.

Men owe duties to their fellow men, and those duties cannot be released by contract in any case,

whether the passenger has or has not paid fare.

Some courts, however, content themselves with stopping at the point of gross negligence, and refuse to allow a carrier to exempt himself from its effects (Ill. Cent. Ry. Co. vs. Read, 37 Ill., 484). Read while traveling in the cars of defendant company, received injuries to his person occasioned by a collision of trains. At the time of the accident he was traveling under a free pass given him by the company upon which were the usual printed conditions contained on free passes exempting the company from all liability for injuries.

It was held that this might exempt them for negligence that had the character of recklessness,

but not from gross negligence.

Is not the whole business community affected by holding contracts that relieve the carrier from all liability valid. The business of transportation is mostly concentrated in a few powerful corporations, and they control and make such contracts as suit them, with such conditions upon travel as they choose and the public are bound to accept.

Contracts of common carriers, like those of persons occupying a fiduciary capacity, are given a position in which they can take undue advantage of the persons with whom they contract; and for these reasons, all contracts that exempt the carrier from that duty which he should exercise from

the nature of his calling, should be held void as an usurpation of power that is conferred on him by his charter.

Concludiⁿg, therefore, that there are certain contracts between carrier and passenger that will be upheld as valid, that all contracts that stipulate for exemption from negligence, whatever be its degree, are repugnant to the law and also contrary to public policy.

In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties that are necessary to every advanced community. And in looking

at the great advancement that has been made in means of travel, and the danger to be encountered in undertaking a journey from fear of accidents caused in many cases from careless agents, one cannot but think that the rigid rules of law that were first applied to common carriers has become a thing of the past.

